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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re E.J. et al., Persons Coming Under the
Juvenile Court Law.

H046270
(Santa Clara County
Super. Ct. Nos. JD 023299, JD 023300,
JD 024109)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

J.R.,

Defendant and Appellant.

Defendant J.R. (father) appeals from the juvenile court's order terminating his parental rights and freeing three of his children for adoption. Father argues the juvenile court erred by finding that the beneficial parental relationship exception to adoption did not apply. Finding no error, we will affirm the order.

I. JUVENILE COURT PROCEEDINGS

These dependency proceedings involve three of father's children with mother: a son, E.J. (born in August 2012); a daughter, A.J. (born in November 2013); and another son, J.R. (born in January 2016). (The record occasionally refers to E.J. and A.J. using father's surname. For consistency with the initial dependency petitions, and meaning no disrespect, we refer to them as E.J. and A.J.)

A. JUVENILE DEPENDENCY PETITIONS (WELF. & INST. CODE, § 300)

The initial juvenile dependency petitions regarding E.J. and A.J. were filed in June 2015 following an incident where their then-five-year-old half-sister F.C. was hit by a car while jaywalking with her biological father. The petitions alleged that E.J. and A.J. were in need of protection based on mother and father's failure to supervise them (Welf. & Inst. Code, § 300, subd. (b)) and based on their half-sibling F.C.'s neglect due to poor supervision by her biological father (Welf. & Inst. Code, § 300, subd. (j); unspecified statutory references are to this code). The petitions alleged that mother was under the influence of methamphetamine when she arrived at the hospital to see F.C. The petitions also recounted mother's extensive history of substance abuse, and of previous dependency petitions involving several of mother's other children dating back to 2003. Father voluntarily completed a drug test shortly after F.C. was hospitalized, which was positive for marijuana and Benzodiazepines. He admitted smoking marijuana that morning while E.J. and A.J. were in his care.

B. DEPARTMENT REPORTS AND JURISDICTION HEARING

According to the Department's jurisdiction and disposition report, mother had previously lost custody of several children (the Department's reports vary in the total number of children, but it is clear that she had lost custody of at least five children before she gave birth to F.C.). Mother had four felony convictions and four misdemeanor convictions. Father's criminal record was more limited, with convictions for one misdemeanor and one infraction. Regarding the date that F.C. was hit by the car, the report states that a social worker went to father's house where he was caring for E.J. and A.J. The residence smelled like marijuana. Father produced an expired medical marijuana card for back pain. When the social worker told father that F.C. had been hit by a car and that mother and F.C.'s biological father had been under the influence of drugs, father reportedly became upset and went upstairs. The social worker then heard what sounded like father throwing an object against the wall.

Regarding the children's health, E.J. was diagnosed with gingivostomatitis, a virus in the mouth that causes painful sores. He needed a root canal, and he had severe diaper rash. A.J. also had severe diaper rash, but was otherwise healthy. The Department recommended that the juvenile court sustain the allegations of the petitions, declare the children dependents, return them to mother and father's custody, and order that the family receive family maintenance services. The juvenile court followed the Department's recommendation, and also declared father the presumed parent of E.J. and A.J.

C. FAMILY MAINTENANCE PERIOD

According to a family maintenance status review report prepared for a hearing seven months after the jurisdiction and disposition hearing, father was employed at a retail store. E.J., A.J., and half-sibling A.C. were all living with mother and father. All three children were in good health and generally on target developmentally. Mother had given birth to a new son, J.R., in January 2016. Mother and father had missed some of the court-ordered drug tests, and one of father's tests was positive for codeine and morphine. The juvenile court ordered continued family maintenance services.

The 12-month status review report noted that parents struggled to attend appointments required in their case plan and that they were not consistently participating in court-mandated drug testing. An addendum to that report expressed concern that parents might be leaving their children unattended. It also appeared that parents were not changing their children's diapers frequently enough. At the review hearing, the juvenile court increased drug testing to twice per week.

D. SECOND JURISDICTION AND DISPOSITION HEARING

Just over a year after the first jurisdiction and disposition hearing, the Department filed supplemental dependency petitions for E.J. and A.J. (§ 387), and a new dependency petition for infant J.R. (§ 300). The petitions alleged that parents had repeatedly failed to participate in court-ordered drug testing. The Department placed E.J., A.J., J.R., and

half-sibling F.C. in protective custody. The initial hearing report noted that when the social worker went to the residence to remove the children at 11:30 p.m., the children were still awake.

The jurisdiction and disposition report noted that visitation between parents and children was mostly positive. The kids cried at the end of visits, but they transitioned back to their foster care providers without difficulty. E.J. reportedly told a foster care provider that father told him to cry at the end of visits so he would be returned to father's custody more quickly.

Several addenda were filed before the hearing. Parents had consistently attended visitation appointments, but parents were still not drug testing consistently; father had completed only seven out of 14 tests since the children were detained two months earlier. The juvenile court ordered the parents to participate in family reunification services.

E. FAMILY REUNIFICATION PERIOD

An interim review report filed three months after reunification services began noted that mother gave birth to another son, I.R., in February 2017. The baby tested positive for methamphetamine, and was taken into protective custody upon discharge from the hospital. Father was unemployed, and had made little progress toward reunification. The report indicated the main concerns were parents' failure to drug test consistently and mother giving birth to a baby who tested positive for methamphetamine. After a hearing, the court ordered that parents continue receiving family reunification services.

The six-month review report noted that the children were largely healthy and developmentally on target (J.R. still needed a corrective foot brace for a club foot). The children believed they were not living with parents because parents were fixing the house. The social worker wanted to develop an age-appropriate explanation so that the children could better understand why they were in foster care. Parents continued to miss the majority of their scheduled drug tests; father had completed only 11 out of 31 tests in

the preceding six months. The report noted concerns relating to visitation. Parents had canceled or were more than 15 minutes late to multiple visits. They struggled to maintain engagement with the children during visits; they brought the children sugary drinks and snacks instead of healthier options; and they had to rely on case aides to help supervise the children during visits at the park. Father had been referred to counseling services; he reportedly told the counselor that he blamed the Department for taking his children away and did not take any responsibility for the current situation. The report noted that although parents clearly loved the children, the Department remained concerned that parents were not taking responsibility for the problems that led to the dependency. After a hearing, the court ordered that family reunification services continue.

The 12-month review report recommended that family reunification services be terminated. Father had been arrested a few weeks after the six-month review hearing and charged with, among other things, making criminal threats, active participation in a criminal street gang, and carrying a concealed firearm. He was released a few days later, but the charges were still pending. Parents had missed the majority of their scheduled drug tests since the last hearing; father missed 18 out of 19 tests. Concerns about visitation also continued. Father had canceled or arrived over 15 minutes late to at least 15 visitation appointments since the last hearing. During visits father often appeared disengaged and complained about the Department in front of the children. He made derogatory or mocking comments about the children. During one visit, a dispute about the foster parents not having provided enough wipes and diapers resulted in father yelling and cursing at the social worker in front of the children. Father stormed out of the visit and left F.C., E.J., and J.R. crying; it took several minutes for the children to calm down. Father told a Department supervisor a short time later that in the future he would need a third party present when interacting with the assigned social worker so that he would not “ ‘do something to her.’ ” The report noted father seemed unable to understand the negative effects of his agitation and aggressiveness on the children.

The report described the children as all in generally good health. E.J., A.J., and J.R. were in a placement together and had formed strong attachments to their foster parents. F.C. and I.R. were together in a separate foster placement. The Department had considered placing all children together, but determined that the “siblings present with needs specific to each child that are currently being well met in their respective foster placements.” Because parents had not engaged sufficiently in reunification services, and because the children benefited from the structure, stability, and consistency of their foster placements, the Department recommended terminating reunification services and setting a section 366.26 hearing.

An addendum filed before the 12-month review hearing noted mother had given birth to another son, E.R., in December 2017. He was immediately taken into protective custody.

The juvenile court terminated reunification services as to E.J., A.J., and J.R. following a hearing.

F. SECTION 366.26 REPORT AND ADDENDUM

A section 366.26 report and one addendum contained an evaluation of the children, an evaluation of the foster parents, and an update on mother and father. E.J. was by then five years old, healthy, developmentally on target, and attending therapy to improve his communication and age-appropriate coping skills. A.J. was four years old, healthy, developmentally on target, working on a slight speech impairment, and attending therapy to learn age-appropriate coping skills. J.R. was two years old, healthy other than his club foot, developmentally on target, and had formed a healthy attachment to his foster parents (he smiled around them, sought their attention, and was willing to be comforted by them). Regarding statements by the children about the prospect of being adopted, E.J. did not seem to understand the concept and expressed his belief that parents were still doing what was necessary to reunify. A.J. also did not have a concrete

understanding of adoption but did tell the social worker on one occasion that “ ‘I wanna live here forever’ ” when referring to her foster placement.

The foster couple stated their willingness to adopt the three children, and also their willingness to allow future visitation with the children’s other siblings and half-siblings. The couple had been together for 10 years, and had been married for nine. They both had steady, long-term jobs. Neither had a criminal or dependency record. They had developed positive, supporting relationships with each child during the preceding 14 months that the children were in their custody. All three children referred to the foster parents as “ ‘momma’ ” and “ ‘dada.’ ”

The report quoted the following voicemail message father left for the social worker a few months after reunification services were terminated: “ ‘I don’t know how fucking stupid you are but my children are not suitable where they’re at. I don’t know what the fuck is or what the fuck any of your Department’s problem is but my kids belong with family and they are mistreated where they are and you need to get that through your fucking head you stupid bitch.’ ” About a month after that voicemail, father made a child abuse report alleging that he saw a mark on J.R.’s back and that J.R. told him that the foster father had dropped him. An emergency social worker immediately responded and reported back to the assigned social worker that she did not see any marks on J.R. and further that none of the children reported any physical or verbal abuse by the foster parents. In response to a complaint by father that the Department’s reports were biased by including only negative information about visits, the addendum noted that when parents attended visits they provided food and clothing to the children; father played catch with J.R.; father watched cartoons with E.J. and A.J.; and father asked the children about their days.

Issues related to visitation persisted. Father had canceled 33 visits during the reunification period. And between termination of reunification services and the section 366.26 hearing, father had canceled 14 of 47 visitation opportunities. The

number of canceled visits appeared to negatively impact all three children, and the children sometimes made up their own excuses about why parents failed to attend a visit. When parents did visit, they sometimes allowed the children to engage in hazardous and unsafe activities like taking trash out of trashcans. Father made negative statements toward the children such as “ ‘your pants don’t fit,’ ” “ ‘your hair is messy,’ ” and “ ‘I don’t like you wearing those sandals.’ ” The foster parents reported that E.J. told them father had asked him “ ‘who does [E.J.] love more, [father] or caregivers?’ ” Father denied asking the question and case aides who supervised the visits had not heard him ask that question, but the report noted father could have asked the question when he took E.J. to the bathroom without an aide present. Father used profanity in front of the children during visits. The Department recommended terminating parental rights and freeing the children for adoption by the foster parents.

G. CONTESTED SECTION 366.26 HEARING

Father and a social worker testified at the contested section 366.26 hearing. (Mother and the biological father of half-sibling F.C. also testified, but their testimony is not relevant to father’s appeal.) Father stated that he frequently saw bruising on his children and that the children told him someone took away gifts the parents had given them. Father testified that E.J. told him his foster father gave him a bruise on one occasion when the foster father was roughhousing and E.J. did not want to play. Father stated that his kids ran to him yelling “ ‘[d]addy’ ” whenever he attended visitation appointments. And father indicated that he felt like the social workers had been trying to work against him throughout the dependency proceedings.

A social worker familiar with the case testified as an expert in risk assessment and permanency planning. The social worker noted that during visits case aides frequently had to remind parents not to allow the children to do dangerous things, like allowing F.C. to place one-year-old I.R. on his head. At the end of visits, the children were all able to transition easily back to their foster parents. The social worker had interviewed E.J. and

A.J. about their living situation. E.J. informed her he liked where he was living, liked the foster parents, and felt safe with them. He still believed that he could not live with mother and father because they were fixing the house. He stated that he liked visits with his biological parents. A.J. knew who her biological parents were and loved them, but the social worker opined that she did not look to her biological parents to fulfill her needs. Regarding father's allegations about bruising, the social worker acknowledged that the children sometimes had bruises. She opined that there was nothing concerning about the bruises because the kids liked to roughhouse. J.R. in particular was accident-prone because he liked to wrestle with E.J. and because of his club foot. The social worker noted that an emergency response social worker had investigated three different abuse allegations father had reported, and that all were deemed unfounded.

At a continued hearing, the juvenile court terminated father's and mother's parental rights as to E.J., A.J., and J.R. The court found the beneficial parental relationship exception to adoption did not apply because parents had not maintained sufficiently consistent visitation. The court also noted that the ease with which the children transitioned back to the foster parents indicated that the parental relationship was not so close as to justify applying the exception.

II. DISCUSSION

Father's briefing raises a single issue: whether the juvenile court erred in determining that the beneficial parental relationship exception to adoption did not apply.

A. STATUTORY TEXT AND STANDARD OF REVIEW

If, after a section 366.26 hearing, the juvenile court determines, "by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).) There are two components to establishing an exception to the statutory preference for adoption. First, a parent must show that one of the statutory exceptions applies. As relevant here, father must show that he "maintained regular visitation and contact" with the children

and that the children “would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) Factors relevant to whether a relationship is beneficial include the child’s age; the portion of the child’s life spent in the parent’s custody; the positive or negative effect of interactions between the parent and the child; and the child’s particular needs, if any. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315 (*Bailey J.*).) Second, continuing the beneficial parental relationship must be a “compelling reason for determining that termination would be detrimental” to the child. (§ 366.26, subd. (c)(1)(B).)

As to the first component, the existence of a beneficial parental relationship is a factual determination which we review for substantial evidence. (*Bailey J., supra*, 189 Cal.App.4th at p. 1314.) Because it was father’s burden to establish the existence of that relationship in the juvenile court (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527–1528 (*I.W.*)), his substantial evidence challenge to that aspect of the juvenile court’s decision cannot succeed unless “the undisputed facts established the existence of a beneficial parental or sibling relationship” as a matter of law. (*Bailey J.*, at p. 1314.) Father’s briefing focuses predominately on evidence presented that would support a finding of a beneficial relationship, without addressing all evidence that supports the juvenile court’s decision. But merely pointing out evidence that could support an alternative finding does not satisfy his burden on appeal. He must present undisputed evidence that is “ ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ ” (*I.W.*, at p. 1528.)

The second component of the exception to adoption—whether a beneficial parental relationship compels the conclusion that terminating parental rights would be detrimental to the child—is a quintessentially discretionary decision calling for the “juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against

the benefit to the child of adoption.” (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.) We review that decision for abuse of discretion. (*Ibid.*)

B. REGULAR VISITATION AND CONTACT

Father argues the juvenile court erred by finding that he had not engaged in regular visitation with his children. Courts have interpreted the phrase regular visitation to require that parents visit “to the extent permitted by court orders.” (*In re I.R.* (2014) 226 Cal.App.4th 201, 212; *In re Grace P.* (2017) 8 Cal.App.5th 605, 613.) Father missed or canceled 14 of 47 visits between termination of reunification services and the section 366.26 hearing. His visitation had also been inconsistent during earlier periods of the dependency proceedings, including 33 missed or canceled visits during the reunification period.

Father contends there were barriers to visitation that the juvenile court should have considered to forgive some of the missed or canceled visits, including his work schedule, transportation issues because his driver’s license was suspended, and his incarceration for part of the reunification period. But the record shows that during the family reunification period the Department rescheduled the time for visits to accommodate father’s work schedule. Indeed, the Department offered four make-up visits, of which father attended only one. Other barriers were avoidable, including father’s arrest on multiple felony charges during the reunification period.

Because regular visitation is a threshold requirement and substantial evidence supports the juvenile court’s finding that father failed to meet it, we could affirm without further discussion. But we will address father’s remaining arguments to show that the juvenile court did not err even if we assume that father maintained regular visitation.

C. CHILDREN’S AGES AND TIME SPENT IN PARENTS’ CUSTODY

By the time the juvenile court decided to terminate parental rights, the children had spent almost two years in foster care (the last 16 months of which with the foster parents who wished to adopt them). The time the children had spent in their biological

parents' custody before being detained was as follows: four years for six-year-old E.J.; almost three years for four-year-old A.J.; and eight months for two-year-old J.R. The children were all still quite young, and had spent substantial parts of their lives in foster care. J.R. had spent the majority of his life with the foster parents. The foregoing did not support a finding that the beneficial parental relationship applied as a matter of law, notwithstanding father's argument that his bond with J.R. overcame the length of time he was out of father's custody.

D. POSITIVE OR NEGATIVE EFFECT OF PARENTAL INTERACTIONS

Father argues that the positive effect of his interactions with the children supported application of the beneficial parental relationship exception. But father's briefing omits serious incidents in which his interactions with the children were less positive than he contends. Father's briefing fails to acknowledge the visit during the reunification period when he yelled and cursed at the social worker in front of the children and stormed out of the room, leading three of the children to cry for several minutes. He also argues that the Department's concerns about his anger management skills had "thin and inconclusive support," but omits mention of his apparent threat that he would " 'do something' " to the social worker if there was not a third party present during future interactions. Nor does he discuss the angry voicemail he left for the social worker after reunification services were terminated.

Father contends his anger issues were related to concerns about his children arriving with bruises to visits, and that his outbursts were nothing "other than responsible parental concern." But the bruising issue was addressed by the Department sending emergency social workers on three separate occasions to investigate father's allegations. And each allegation was deemed unfounded by the Department.

Regarding father's negative comments about his children's appearance, he contends that because he denied making the comments and case aides reportedly denied hearing them, they could not have occurred. The record does not support father's

argument. Though the case aides did not hear father ask E.J. “ ‘who does [E.J.] love more, [father] or caregivers?,’ ” nothing in the record suggests that case aides ever denied hearing father make negative statements about the kids such as “ ‘your pants don’t fit,’ ” “ ‘your hair is messy,’ ” and “ ‘I don’t like you wearing those sandals.’ ” To the contrary, the report states those comments had become such “a usual routine” from father that case aides coached him to re-direct any concerns to the social workers instead of the children. In any event, the juvenile court was free to find father’s self-serving testimony not credible and to credit the Department’s evidence instead.

Father attacks the juvenile court’s finding that the children’s ease in transitioning back to their foster parents after visits with their biological parents supported an inference that the parental relationship with children was not strong enough to support the parental relationship exception. He argues it is a “weak inference, at best,” and suggests that a “more apt conclusion is that the high quality of the visits ... had the positive effect of easing transitions.” While different conclusions could be drawn, the juvenile court’s inference is both reasonable and consistent with dependency case law. (E.g., *In re C.F.* (2011) 193 Cal.App.4th 549, 557 [affirming decision that beneficial parental relationship exception did not apply based on evidence that the children were “ ‘used to the mother coming and going from their lives and transition[ed] easily from the visitations with their mother’ ”].) The juvenile court could reasonably conclude that the easy transitions showed although the children loved their parents, they did not view their biological parents as having a parental role in their lives.

In sum, ample substantial evidence supports the juvenile court’s conclusion that the beneficial parental relationship exception did not apply. As such, we also find no abuse of discretion in the juvenile court’s decision that the parental relationship was not so strong as to compel the conclusion that terminating parental rights would be detrimental to the children.

III. DISPOSITION

The juvenile court's order terminating parental rights and freeing the children for adoption is affirmed.

Grover, J.

WE CONCUR:

Mihara, Acting P. J.

Danner, J.

H046270 - *In re E.J.; D.F.C.S. v. J.R.*